

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROSA MURGIA, NO C-09-3944 VRW (PR)

Petitioner,

ORDER DENYING MOTION TO PROCEED
IN FORMA PAUPERIS AND
DISMISSING PETITION

PAUL COPENHAVER, Warden, et al.,

Respondent(s).

(Doc ## 2 & 4)

Petitioner, a federal prisoner currently incarcerated at the Federal Corrections Institution ("FCI"), Dublin, and proceeding pro se, has filed the instant petition for a writ of habeas corpus pursuant to 28 USC § 2241. Doc #1. Petitioner is in the custody of the Bureau of Prisons ("BOP") following her 2008 conviction of one count of distributing methamphetamine; her projected release date is August 11, 2010. Id at 15.

Petitioner challenges the decisions by the FCI warden and the BOP regional director refusing to exercise the discretion granted the BOP under 18 USC §§ 3621 & 3624 to transfer petitioner to a Residential Reentry Center ("RRC") for a period beginning six

1 months before the expiration of her sentence. Doc ## 1 & 4.
2 Petitioner also seeks leave to proceed in forma pauperis. Doc ## 2
3 & 4. As explained below, the petition is subject to dismissal for
4 failure to exhaust administrative remedies.

5

6 I

7 Although § 2241 does not specify that petitioners must
8 exhaust available remedies before filing petitions for a writ of
9 habeas corpus, the Ninth Circuit "require[s], as a prudential
10 matter, that habeas petitioners exhaust available judicial and
11 administrative remedies before seeking relief under § 2241." Laing
12 v Ashcroft, 370 F3d 994, 997 (9th Cir 2004).

13 The BOP has established procedures by which prisoners can
14 seek review of "an issue relating to any aspect" of a prisoner's
15 confinement, thereby satisfying the administrative exhaustion
16 requirement. 28 CFR § 542.10. The procedures apply to all
17 prisoners in programs operated by the BOP. Id. The first level of
18 review is "informal resolution" at the institutional level. Id §
19 542.13. A prisoner who is not satisfied with the warden's response
20 resulting from the informal resolution process may then submit an
21 appeal to the regional director. Id § 542.15. A prisoner who is
22 not satisfied with the regional director's response may submit an
23 appeal to the general counsel of the BOP. Id. Once the general
24 counsel responds to and signs the appeal, the prisoner has exhausted
25 administrative remedies. See id § 542.11.

26 Here, petitioner states that she was "*in the process of*
27

28

1 *exhausting her administrative remedy through the BOP's*
2 *administrative appeals process" when she filed the instant petition,*
3 *thereby conceding she did not exhaust her administrative remedies*
4 *prior to filing the instant petition. Doc #1 at 3, emphasis added.*
5 Documents attached to her petition show that she sought informal
6 resolution and, then, because she was not satisfied with the
7 institutional response, appealed that decision to the regional
8 director on July 28, 2009. Doc #1 at 17-21. On September 16, 2009,
9 almost one month after the instant petition was filed, petitioner
10 filed additional documents showing that she filed a "Central Office
11 Administrative Appeal" dated September 10, 2009 directed to the
12 general counsel appealing the regional director's denial; no
13 response to that appeal is on file with the Court. Doc #4 at 4-8.
14 It appears, therefore, that her appeal to the general counsel is
15 still pending. Doc #4 at 4. Petitioner nonetheless urges the
16 court to waive the exhaustion requirement and consider the merits of
17 her petition.

18

19

II

20

Because it is not a jurisdictional prerequisite, the
21 exhaustion requirement may be waived in limited circumstances. See
22 Laing, 370 F3d at 998 & 1000-01 (listing circumstances under which
23 waiver of exhaustion requirement may be appropriate, which include
24 "when: (1) available remedies provide no genuine opportunity for
25 adequate relief; (2) irreparable injury may occur without immediate
26 judicial relief; (3) administrative appeal would be futile; and (4)

27

28

1 in certain instances a [petitioner] has raised a substantial
2 constitutional question").

3 Here, petitioner claims exhaustion would be futile
4 "because the BOP issues a form letter of denial stating that the
5 individual has been considered and denied based upon their
6 individual RRC needs, while being told by [s]taff that they are
7 being categorically denied." Doc #1 at 3. Petitioner admits that
8 "[r]esponses for those who have pursued administrative remedy
9 reflect that they were considered on an individual basis" but
10 claims, without offering any explanation why, "[t]hat is not the
11 case." Id at 8. Petitioner adds that because the "Deputy Director"
12 is married to the warden, "[i]t is worst case Nepotism, where the
13 Deputy Director is responsible for reviewing her husband's
14 decisions, [such that] inmates cannot expect objective review of
15 their administrative remedy." Id. Completely lacking any
16 evidentiary support, petitioner's conclusory allegations that
17 exhaustion would be futile are unconvincing and insufficient to
18 excuse her failure to exhaust administrative remedies.

19
20 III

21 For the foregoing reasons, the court finds petitioner has
22 not exhausted her administrative remedies and that she is not
23 entitled to waiver of the exhaustion requirement. Accordingly, the
24 petition for a writ of habeas corpus under § 2241 is hereby
25 DISMISSED without prejudice to petitioner's filing a new habeas
26 corpus action after exhausting the BOP's administrative appeals

1 process.

2 Additionally, petitioner's request for leave to proceed in
3 forma pauperis (Doc #2; see Doc #4) is DENIED. Documents on file
4 with the court show petitioner's average monthly deposits for the
5 past six months was \$350.00 and her average monthly balance for the
6 same period was \$30.65. The \$5.00 filing fee is now due.

7

8 IT IS SO ORDERED.

9

10

11



12 VAUGHN R WALKER
United States District Chief Judge

13

14

15

16

17

18

19

20

21

22

23

24

25

G:\PRO-SE\VRW\HC.09\Murgia-09-3944-BOP-dismiss-exhaustion.wpd

26

27

28